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IN THE

Supreme Court of the United States

October Term, 1959.

No. 836

IN THE MATTER OF
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor.

Norine J. Augus, Admx., George Doherty, Raymond Nicholas, Adrian Parker, Hugh J. McKowne, Margaret M. McAuliffe, Admx., John Fedor, Maurice Dunlap, Joseph Coyle, Catherine Curristan, Admx., Joseph Muller, Robert J. Jerry and John J. Walsh,
Petitioners.

Herman T. Stichman, as trustee of debtor,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Petitioners.

HERMAN T. STICHMAN, AS TRUSTEE OF DEBTOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Norine J. Augus, Admx., George Doherty, Raymond Nicholas, Adrian Parker, Hugh J. McKowne, Margaret M. McAuliffe, Admx., John Fedor, Maurice Dunlap, Joseph Coyle, Catherine Curristan, Admx., Joseph Muller, Robert J. Jerry and John J. Walsh, petitioners, by their attorneys, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 7, 1960.

OPINIONS BELOW.

The memorandum opinion of the United States District Court for the Southern District of New York printed in the Appendix, *infra* (pp. 1a-5a) is reported at 178 F. Supp. 103 (D. C. S. D. N. Y., 1959). The opinion and judgment of the United States Court of Appeals for the Second Circuit affirming the District Court's judgment are printed in the Appendix, *infra* (pp. 7a-10a), and the opinion is reported at 273 F. 2d 707 (C. A. 2, 1960).

JURISDICTION.

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 7, 1960. The jurisdiction of this Court is invoked under c. 646, Act of June 25, 1948, 62 Stat. 928, 28 U. S. C., Sec. 1254(1).

QUESTIONS PRESENTED.

1. In a railroad reorganization under Chapter X of the Bankruptcy Act, does not equity require that a preference be granted the Federal Employers' Liability Act[1] ("F. E. L. A.") claims of employees injured or killed in the course of their employment with the debtor railroad?

2. Is not the Court of Appeals in error in so construing Chapter X of the Bankruptcy Act as to use the Chapter's silence with respect to specific priorities as justification for barring the chancellor from doing the equity that Chapter X commands he do?

3. Is not the Court of Appeals in error in justifying its prohibition of a preference to these petitioners by holding that the chancellor may not do equity here simply because the debtor is not a Section 77 Railroad?

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1. Act of August 11, 1939, c. 685, 53 Stat. 1404, 45 U. S. C. Sec. 51 *et seq.*

STATUTE INVOLVED.

The specific statutory provisions involved are (1): the Bankruptcy Act, Chapter 10, § 115 (11 U. S. C. A. § 515), which provides as follows:

> Upon the approval of a petition, the court shall have and may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it, exercise all the powers, not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature. July 1, 1898 c. 541, § 115, as added June 22, 1938, c. 575, § 1, 52 Stat. 884.

(2): the Federal Employers' Liability Act, 45 U. S. C. § 51 which provides as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

STATEMENT OF THE CASE.

The debtor, a New York and New Jersey corporation is in reorganization under Chapter X of the Bankruptcy Act. That Act provided the basis for federal jurisdiction in the court of first instance—the United States District Court for the Southern District of New York. The debtor has real estate holdings and operates an interstate, interurban electric railroad in whose employ were all of the petitioners or petitioners' decedents. All of these petitioners or their decedents were injured or killed in the course of that railroad employment with the debtor. The character of their employment was quintessentially railroading.

The injured petitioners or their decedents who were killed railroading for the debtor are represented by a craft union which is a railroad union. They are subject to the provisions of the Railroad Retirement Act, the Railroad Labor Act, and the Railroad Unemployment Act: see *In the Matter of Hudson & Manhattan Railroad Company*, 126 F. Supp. 359, 361, 362 (D. C., S. D. N. Y., 1954). Their redress for injury or death during the course of their employment is under F. E. L. A. The instant claims arise from actions brought against the debtor under that statute. The applicability of the F. E. L. A. is not in issue.

Originally, the debtor insisted that its reorganization should take place under Section 77 of the Bankruptcy Act [2] rather than under Chapter X.[3] See *In the Matter of Hudson & Manhattan Railroad Company, supra.* Had the proceedings remained under Section 77 as the debtor had originally sought, petitioners would have been entitled to statutory priority [4] and this appellate stage would never have been necessary.

However, it was judicially determined that the debtor was not such a railroad as meets the definition in Section 77(n) of that Act, but was on the contrary a corporation whose reorganization demanded the application of Chapter X of the Bankruptcy Act. *In the Matter of Hudson & Manhattan Railroad Company, supra.* Like equity receiverships, that Chapter provides no specifically designated priorities. Priorities can and must be determined by the court sitting as a court of equity and applying equitable principles.

The claims at bar (all under the F. E. L. A.) arise from employment accidents all of which occured before the appointment of the receiver on November 24, 1954. Of the thirteen, eleven suits were started before the appointment of the receiver; two were started after November 24, 1954. In eleven of the actions, the damages have been liquidated by agreement between the petitioners and the trustee. The petitioners, the dates of accident, the dates of suit and the amounts involved are as follows (liquidated, except where otherwise indicated):

---

2. 11 U. S. C. A. § 205.

3. 11 U. S. C. A. §§ 501-676.

4. Section 77(n) of the Act specifically provides in part:
"* * * In proceedings under this section, and in equity receiverships of railroad corporations now or hereafter pending in any court of the United States, claims for personal injuries to employees of a railroad corporation, claims of personal representatives of deceased employees of a railroad corporation, * * * shall be preferred and paid out of the assets of such railroad corporation as operating expenses of such railroad * * *."

Petitioner	*Date of Accident*	*Date of Suit*	*Amount*
Adrian Parker	7/29/47	5/ 9/50	$ 5,500.
Raymond Nicholas	10/48 & 6/30/49	9/ 5/51	$ 6,700.
George Doherty	4/16/49	5/10/51	$ 7,200.
Maurice Dunlap	6/17/51	5/19/52	$ 1,500.
John J. Walsh	6/29/52	10/ 7/52	$ 700.
Joseph Coyle	5/ 2/52	12/23/52	$37,500.
Hugh J. McKowne	5/19/52	1/ 3/52	$15,000.
John Muller	1/ 7/54	7/18/55	$ 4,500.
Margaret M. McAuliffe, Admx. of Estate of Dennis J. McAuliffe, dec'd.	10/14/51	3/ 5/52	$87,500. (unliquidated)
Catherine Curristan, Admx. of Estate of Patrick Curristan, dec'd.	2/18/54	2/26/54	$67,500.
Norine J. Augus, Admx. of Estate of Benjamin Augus, dec'd.	4/30/54	5/21/54	$49,000.
John Fedor	9/27/54	3/ 8/54	$20,000. (unliquidated, defended by Penna. R.R. Co.)
Robert J. Jerry	10/19/54	8/16/57	$ 1,100.

In an effort to invoke the equitable powers of the chancellor, on November 6, 1958 the thirteen petitioners filed amended proofs of claim pursuant to Order No. 279 of the District Court for the Southern District of New York, of the same date, in the reorganization proceedings under Chapter X of the Bankruptcy Act. Those amended proofs claimed priority over claims of the holders of the debtor's securities, claims for taxes and other charges, and general unsecured claims.

On April 7, 1959, respondent, trustee of the debtor, filed objections to the allowance of priority.

An amended plan of reorganization approved by the District Court on April 28, 1959, *In re Hudson & Manhattan Railroad Company*, 174 F. Supp. 148 (D. C. S. D. N. Y., 1959) proposes to classify petitioners' F. E. L. A. claims as merely unsecured claims which, under the plan, would receive 10 cents per dollar of the claim allowed.

Hearing on the issue of the priority claimed was had before Hon. Archie O. Dawson, Judge of the District Court, on May 4, 1959. On May 27, 1959, Judge Dawson entered Order No. 323 denying petitioners' claims for priority. On appeal, the judgment of the United States Court of Appeals for the Second Circuit affirmed the order denying the priority on January 7, 1960. This Petition for a Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT.

1. The decision below has adjudicated an important question of federal law which has not been, but should be, settled by this Court: the priority status of F. E. L. A. claims in a railroad reorganization under Chapter X of the Bankruptcy Act.

2. The decision below, in genuine principle, conflicts with the decisions in *Bowen v. Hockley*, 71 F. 2d 781 (C. A. 4, 1934) and *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. Co. et al.*, 122 F. 2d 326 (C. A. 8, 1941).

3. The decision below represents the refusal of a chancellor to do that kind of equity which is demanded by the facts at bar, and it is in conflict with the philosophy underlying the decisional law through which this Court has been diligent to protect the rights of F. E. L. A. claimants since the enactment of the 1939 amendment.

ARGUMENT.

In a Chapter X Reorganization of a Railroad, Equities Demand That Claims of Employees Injured in the Course of Their Employment Be Granted Priority.

This is a case without precedent and one which raises a vital problem in the administration of railroad reorganizations under Chapter X of the Bankruptcy Act. The statement of the case, *supra*, demonstrates both its anomaly and the reason for the application of equitable principles to the relief sought by the petitioners.

To see what the courts below did to petitioners' application for a priority is to grasp the compelling nature of this Petition.

As earlier indicated, notwithstanding the debtor's original efforts to undergo reorganization in a proceeding under Section 77 of the Bankruptcy Act (in which event petitioners unquestionably would have had a priority for their F. E. L. A. claims) the debtor was placed in reorganization under Chapter X of the Bankruptcy Act.

Section 115 of Chapter X provides that the court shall have and may exercise all the powers "* * * not inconsistent with the provisions of this chapter, which a court of the United States would have if it had appointed a receiver in equity of the property of the debtor on the ground of insolvency or inability to meet its debts as they mature."

In re Chicago, R. I. & P. Ry. Co., 90 F. 2d 312 (C. A. 7, 1937), holds at page 316:

> "* * * The classification of claims as proper to be paid as current expenses from current income under the decisions cited is based not upon the bankruptcy act but upon the inherent rules of equity. Congress made no provision for the allowance of priority of

current expenses in equity cases but the Supreme Court found that equity itself demands such classification. * * *"

In the Matter of General Stores Corporation, 164 F. Supp. 130 (D. C. S. D., N. Y., 1958), the court said, at page 137:

> "* * * The rule is now too clear for argument that a bankruptcy court is vested with broad equity powers and in a Chapter X proceeding is just as much a court of equity as its statutory and chancery antecedents. Vanston Bondholders Protective Committee v. Green, 1946, 329 U. S. 156, 165, 67 S. Ct. 237, 91 L. Ed. 162; In re Schafer's Bakeries, D. C. E. D. Mich. 1957, 155 F. Supp. 902, 913; see also Pepper v. Litton, 1939, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281. * * *"

See also *In re Sixty-seven Wall Street Restaurant Corporation,* 23 F. Supp. 672, 673 (D. C. S. D., N. Y. 1938).

It is therefore clear that priorities, either in an equity receivership or in a Chapter X proceeding, are to be determined by the District Court's application of equitable principles. But the District Court, sitting in equity, refused to apply equitable principles. The Court of Appeals, with an equal disregard for the demands of equity, endorsed that refusal. The ultimate resolution of the question before both lower courts was based solely and simply upon the fact that the petitioners were not given priority *by law.*

The Court of Appeals affirmed (p. 9a) the District Court's holding that (p. 4a):

> "* * * Under the circumstances the Debtor is not a railroad corporation within the meaning of Section 77(n) of the Bankruptcy Act and the provisions for priority therein contained would not be applicable to the employees of the Debtor."

We do not dispute this statement of the law, but it is not, as the lower courts held, the end of the problem. Having determined that no legislation gave us priority, the chancellor and the Court of Appeals simply and unaccountably stopped. They made no examination of petitioners' equitable rights. The matter rested upon the bare bones of statutes. The issue was determined without a single reference to equity. Here lies the hard core of the error below, for the decision looks only to the law and not at all to equity for its result.

What then are the equities that must be applied to the petitioners' claims?

First. Had these F. E. L. A. claimants been employees or deceased employees of a Section 77 railroad, there is no doubt that they would have had an automatic priority by virtue of the provisions of Section 77(n). It is sought to deny them that priority by a purely artificial and arbitrary distinction. These claimants are subjected to precisely the same hazards as are the claimants of a Section 77(n) railroad. Their bodies are injured and their lives taken by the same types of wheels on the same kind of track. Their labor and their exposure to hazard are identical to those of their Section 77 brothers. Their craft union is a railroad union. They are subject to the provisions of the Railroad retirement Act, Railroad Labor Act, and the Railroad Unemployment Act: see *In the Matter of Hudson & Manhattan Railroad Company*, 126 F. Supp. 359, 361, 362 (D. C., S. D., 1954).

It is the function of equity to remedy deficiencies in the law. It is obviously a manifest inequity for people whose situation is identical to receive different treatment. There is no possible or discernible reason for giving relief to one while leaving the other substantially remediless.

Second. Inequalities, discriminations and deficiencies in the law apart, there are real and substantial human

equities which, we submit, must appeal to the conscience of a chancellor.

Perhaps the best statement of these equities is found in *Bowen v. Hockley*, 71 F. 2d 781 (C. A. 4, 1934). The question involved was whether an award of workmen's compensation made prior to receivership should continue to be paid out of earnings. Judge Parker said, at page 783:

> "* * * A business is more than the property which it employs. It represents all of the intangible human values which are put into it including the labor and loyalty of its employees * * *. Uninjured laborers contribute by their labor to the operation of the business and are paid on the basis of that contribution. The employee who is injured or killed has made his contribution, just as the superannuated employee has made his; and in equity and good conscience the compensation award should be held a charge on the income of the business, just as is the wage of the laborer or the pension of the superannuated employee * * *. The principle of equity applicable is that he who seeks equity must do equity. Creditors and lien claimants need not seek the aid of equity in enforcing debts and liens. When they ask a court of equity to grant the extraordinary relief of protecting a private corporation's business from the legal process of its creditors and to operate it under order of court so as to preserve its going concern value for their benefit, they should be willing that *the claims of those who have helped to give it value as a going concern* and whose claims have been imposed upon it by law as a fixed expense should be paid from the income derived from its continued operation * * *." (Emphasis ours.)

That case answers conclusively any argument that the creditors or the trustee for the debtor may make that these claimants or their decedents contributed nothing to the enhancement of the value of the property.

The case also stands as a genuine conflict in principle with the decision below. In *Bowen v. Hockley, supra,* the chancellor was moved by precisely those equities which we vigorously urged upon the lower courts. The fact is that they bluntly refused to recognize their very existence, let alone apply them to the case at bar.

That the claim involved in *Bowen* was a workmen's compensation claim is totally without significance. Workmen's compensation is one way of compensating a man injured in the course of his employment. The F. E. L. A. is merely another way. And the equities as between the two are indistinguishable. Both include the "intangible human values" of "labor and loyalty". Both classes of employees "contribute by their labor to the operation of the business." Each employee "who is injured or killed has made his contribution". Both have "helped to give [the business] value as a going concern". There may be a discernible distinction between the forms of remedy. Between the equities involved there is none.

In *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. Co. et al.*, 122 F. 2d 326 (C. A. 8, 1941), one Eubanks, an injured employee of a Section 77 railroad found that his priority under Section 77(n) would not pay him in full. He then sought preference over other operating expenses asking that his claim be paid in full. The court fully recognized there was no provision in the statute for such a result but said at page 335:

> "* * * And, in the situation which we are now considering, the unsatisfied claim of appellant Eubanks for personal injuries touches our equitable conscience with a stronger natural and social appeal, than the commercial-risk claims of joint facilities agreements, car repair bills, and kindred items which are involved.
>
> "The force and universality of this natural appeal, we believe, can hardly be denied. That which so instinctively and universally impresses itself as the

natural justice of a situation must not go unheeded by a court, in dealing with those inherent and flexible values termed 'equities', unless the circumstances are so individualistic in nature as to transgress the sound general principles by which the field of jurisprudence must fundamentally be marked. We find no 'keep out' signs here. It should perhaps be said also that the path does not appear to bear any 'markers' from past decisions, but this is not a deterrent to the step of sound conscience. The path of equity is not a dead end. * * *"

That equity court's recognition of its inherent power and responsibility and the principled application of that power and responsibility must, we submit, apply with the same force and yield the same result here. The power to command the doing of equities notwithstanding a silent statute no more barred the chancellor there than it should have here. Yet that silence led here to an absolution of exactly that responsibility which the *Eubanks* court recognized it had to accept. A searching examination of the opinions of both lower courts reveals an absolute absence, indeed a substantive refusal, to bring equity into this equity proceeding. In that principled sense, the decision below is in true conflict with *Eubanks*.

The consideration upon which these claims rest is not the sale of wood or steel or wheels or coal or commercial paper. Rather it is the bodies, the services, the loyalties, and sometimes the lives of these employees which contributed to the continued running of this railroad. Surely the conscience of a chancellor or of a Court of Appeals cannot say that human dedication and human life are considerations of lesser importance than goods sold for profit or money advanced with the sole idea of a return on its investment. This was the equitable appeal that the court recognized and enforced in the case of *Reconstruction Finance Corp. v. Missouri-Kansas-Texas R. Co., et al.*, 122

F. 2d 326 (C. A. 8, 1941), *supra*. The lower courts would have no part of it. We earnestly submit this Court should and will accept the responsibility for responding to that equitable appeal.

This is both the novelty and importance of the issue here. Never before has this Court decided that important question in the administration of railroad reorganizations under Chapter X of the Bankruptcy Act. We believe that equity compels a chancellor faced with these kinds of F. E. L. A. claims in these circumstances to grant a priority. We believe further that it is now time that future chancellors be instructed that on such facts the silence of a statute is not a justification for refusing to do equity and that the equity they are to do is to grant a priority.

The chancellor and the Court of Appeals seem to have based their decisions upon two grounds:

First: that prior decisions under equity receiverships did not allow those in the position of the claimants any preference; and

Second: That when Congress amended the Bankruptcy Act in 1939 to provide for a preference in the case of injured employees of Section 77 railroads, its silence with respect to Chapter X proceedings was indicative of an intention to withhold such preferences to employees of Chapter X railroads.

Each of these positions is, we submit, specious.

First. It cannot be gainsaid that earlier courts considered the plight of injured railroad workers or their dependents in a socio-legal and philosophical climate radically different from that existing at the present time. Since the 1939 amendment to the F. E. L. A. this Court has shown a burgeoning concern for railroad employees. Not only was the ambit of the Act greatly enlarged and the scope of interstate commerce greatly expanded, but the entire concept of actionable negligence underwent a drastic metamorphosis.

These were implicit expressions of a judicial concern for employees' welfare that later found expression in the words of Mr. Justice Douglas' concurring opinion in *Wilkerson v. McCarthy, et al.*, 336 U. S. 53, 68, 69 S. Ct. 413, 414, 415 (1949):

> "* * * The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for the Act did not make the employer an insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses-fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.' * * *"

We respectfully submit that *Wilkerson* and the decisional law that followed represent significant expressions of the underlying public importance this Court attaches to the treatment railroad employees receive at the hands of our courts. We believe that the instant issue is another aspect of that problem of public importance, and this Court should accept this first opportunity to speak with its authority upon a matter of this significance.

No such authoritative concern for the treatment of railroad employees existed at the time of the decisions deny-

ing preferences in equity receivership. Indeed, it may be doubted whether the decisions denying preferences in equity receiverships really considered the equities at all and whether those decisions are now good law.

It is significant that in *Pitcairn, et al. v. Fisher,* 78 F. 2d 649 (C. A. 8, 1935), cited by both lower courts, in denying a preference, the court set forth the reasons why preferences were granted and then said, at page 652:

> "* * * These are, of course, cold legal reasons; but absent a statute, and there is none, such reasons must prevail. * * *"

It cannot logically be argued that a decision so grounded upon "cold legal reasons" in any wise considers the equities of the situation. We therefore submit that such decisions were in themselves wrong. They were not bottomed on equity any more than the decision in this case below was. But if it be contended that those decisions were based upon equities as courts saw them at that time, we need not go so far as to say that they are wrong. It is enough to point out what has been so cogently said in *Reconstruction Finance Corporation v. Missouri-Kansas-Texas R. Co., et al.,* 122 F. 2d 326 (C. A. 8, 1941), at page 335:

> "* * * The path of equity is not a dead end * * *"

In *Bowen v. Hockley, et al.,* 71 F. 2d 781 (C. A. 4, 1934), the court said, at page 786:

> "* * * One of the glories of equity jurisprudence is that it is not bound by the strict rules of the common law, but can mold its decrees to do justice amid all the vicissitudes and intricacies of life. The principles upon which it proceeds are eternal; but their application in a changing world will necessarily change to meet changed situations. * * *"

Equity is an expanding concept. The "equities"—or supposed lack of them—that motivated earlier courts are

not necessarily the equities that should motivate present day courts.

These claimants are railroad workers, and Section 106(3) of Chapter X extends its provisions to "any railroad corporation excepting a railroad corporation authorized to file a petition under Section 77 of this Act." It cannot be doubted for a moment that the equities that were thought to exist in favor of injured railroad workers in 1933 are far different from the equities that do exist in favor of injured railroad workers in 1960. The determination of this fact of life need not and does not depend upon irresponsible speculation. We know that this is so from the drastic amendment to the F. E. L. A. in 1939 and from the stream of liberal and protective opinions that have flowed from the Supreme Court and from the federal and state courts of our land within the past ten years at least. It is within the framework of this changed concept of equities that the rights of these claimants must be fixed. It is along this pathway that equity must proceed, not believing that it is a dead end but recognizing always that the way is open for expanding concepts and the application of equity in a changing world.

Second. Although our jurisprudence teems with utterances and holdings that preferences are to be determined by "the equities", neither opinion below makes a single reference to any equities. They do not consider in the slightest the equities of these claimants as against the equities of secured creditors and bondholders. Indeed, they do not even consider the equities of these claimants at all. In short, the lower courts simply and completely abrogated the responsibilities of a chancellor with a conscience. This was the "absolution of * * * judicial responsibility" deplored by the court in *Reconstruction Finance Corporation v. Missouri-Kansas-Texas R. Co. et al.*, 122 F. 2d 326 (C. A. 8, 1941). Rather than being on the equity side of the court where we had started, we found ourselves cast on to the law side of the court, and that by a specious analogy.

The chancellor and the Court of Appeals seem to have felt compelled to hold as they did because when Congress amended Section 77(n) to bring within its scope the equity receiverships of Section 77 railroads it remained silent as to Chapter X.

Such a rationale, we submit, advances neither the cause of law nor of equity.

Both lower courts apparently believe that a court of equity has no power to establish a priority in the absence of a specific Congressional provision to that effect. This, of course, is not the case.

In *Reconstruction Finance Corporation v. Missouri-Kansas-Texas R. Co., supra,* the claimant was an employee injured during the administration of the railroad reorganization. It was found that although the claimant, Eubanks, was given a preference by Section 77(n), the application of this preference would still not pay his claim in full. Eubanks sought to be ranked ahead of other operating expenses and other preferential creditors so that his claim would be paid in full. In upholding the claim for priority, the court said, at page 335:

> "• • • In Eubanks' case, where the injury occurred during the receivership operation, the statute, as a matter of fact, was not needed to give his claim the status of an operating expense. In any event, we find nothing in the language of the statute that requires a court of equity, as a matter of legislative command, to give claims for the personal injury or death of a railroad employee, whether arising before or during the receivership operation, a priority over other expenses of operation.
>
> "*But the absence of a legislative mandate must not be treated as an absolution of our judicial responsibility in the case.* The very nature and purpose of chancery jurisdiction requires that we do not close our eyes and conscience to those natural and

> compelling equities which are sufficiently broad to furnish the basis for a sound governing principle in the situation presented * * *." (Emphasis ours.)

It can fairly be said that the situation of Eubanks was substantially similar to the situation of the claimants here. Eubanks was seeking equity. So are these claimants. He was in a court of equity. So are these claimants. He was seeking something which the legislature had not explicitly given him. These claimants are likewise seeking in equity that which the legislature has not explicitly given them. The *Eubanks* court found no difficulty in acting as a court of equity should act. These claimants in equity should be no more frustrated in the realization of their equitable claim than *Eubanks* was in the realization of his. This is especially so since we have now had nineteen years of experience since *Eubanks* was decided, experience rich with examples of the concern of Congress and the courts for injured railroad employees. We cannot believe that in 1960 Congress means injustice by its silence any more than it intended injustice in 1941 by a silence equally as deep.

Here is the irony: the *Eubanks* court granted the priority in spite of Congressional silence. The lower courts here not only refused priority because of such silence, but used a statute which expressly gives railroad employees a preference [Sec. 77(n)] *to oust* them of their equities in this proceeding. This is not equity, but rigid legalism.

In *Graselli Chemical Co. v. Aetna Explosives Co., Inc.*, 252 Fed. 456, 459 (C. A. 2, 1918), the court said:

> "* * * The faculty of equity must be energetic, productive, and progressive. But to exercise this right of the court of equity there must be some show of an injustice attempted or about to be perpetrated upon the petitioners. * * *"

Who can deny that the rankest injustice is about to be perpetrated upon these petitioners if their fellow railroad

workers on the Missouri-Kansas-Texas [5] are paid in full while they, suffering similar injuries, inflicted by the same type of equipment, while they were doing the same kind of work receive ten cents on the dollar? The only difference between these railroads is in the insignia on the hats their employees wear.

Conclusion.

These claimants-petitioners present powerful equities that are identical to those for which a specific priority is granted under Section 77(n) of the Bankruptcy Act. Their problem is one of genuine public importance and one on which this court has not spoken. The court charged with the chancellor's responsibilities under Chapter X of the Bankruptcy Act, refused to accept those responsibilities to do equity. The Court of Appeals made an equivalent refusal. Instead, both courts used a fallacious legal argument and the completely inconclusive silence of Congress to frustrate the demands of equity. The result has been to cast these claimants into the position of unsecured creditors rather than afford them the full relief that is their due: fundamental fairness (equity). The Writ should issue; the judgment below be reversed, and the priority granted.

Respectfully submitted,

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Counsel for Petitioners.

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Of Counsel.

---

5. The railroad involved in *Reconstruction Finance Corp. v. Missouri-Kansas-Texas Railway Co., supra*, where the claimant Eubanks was paid in full on a preference that equity gave him not withstanding the silence of a statute.

Appendix.

MEMORANDUM.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

No. 90460.

IN THE MATTER
of
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor.

DAWSON, D. J.:

This is an application by certain tort claimants for priority status in the administration of the estate of the Debtor.

The 91 claims consist of 81 which arose before the filing of the petition, including 28 employee claims and 53 non-employee or so-called public claims. The remaining 10 claims arose during the interim period, i.e., after the filing of the petition but before the appointment of a receiver. These interim claims include 5 employee claims and 5 public claims.

Due notice of a hearing was given and briefs were submitted by several parties. Argument was heard and the Court makes the following as its determination of this important issue.

The Debtor, a New York and New Jersey corporation, is in reorganization under Chapter X of the Bankruptcy

Act. *In re Hudson & Manhattan Railroad Co.*, 126 F. Supp. 359 (S. D. N. Y. 1954). Its business has two interrelated aspects: the ownership and operation of an interurban electric railway and the ownership and operation of two large office buildings and other real estate in downtown Manhattan in the City of New York. Herman T. Stichman was appointed Trustee of the Debtor by order of this Court dated December 14, 1954.

The Court has at this time approved a plan for reorganization of the Debtor and has made the requisite findings that such plan is fair, equitable and feasible. The administration of certain claims now pending against the Debtor is essential to a proper and orderly reorganization of this important commuter link in Metropolitan New York.

The basic issue which this Court must decide is whether or not in a Chapter X reorganization certain claimants are entitled to priority over security holders. This determination is of importance not only to the estate of the Debtor but to the individual tort claimants involved in this action.

It is well established that all tort claims against a Debtor which has gone into receivership, are to be denied priority if the claims ante-dated the receivership. *St. Louis Trust Co. v. Riley*, 70 Fed. 32 (8th Cir. 1895); *Pennsylvania Steel Co. v. New York City Ry.*, 216 Fed. 458 (2d Cir. 1914); *Veatch v. American Loan & Trust Co.*, 79 Fed. 471 (8th Cir. 1897), *aff'd on rehearing*, 84 Fed. 274 (8th Cir. 1897).

No good reason has been advanced why so-called public claims (which are claims of persons other than employees) should be treated as anything other than claims of general creditors in the course of this proceeding. With reference to the claims for personal injuries to employees, argument has been made that certain sections of the Bankruptcy Act indicate that such claims should be entitled to priority.

In 1933 Section 77 of the Bankruptcy Act dealing with railroad reorganizations was enacted. Section 77(s) of the 1933 Act was the predecessor of the present Section 77(n). It provided, in part:

> "In proceedings under this section, claims for personal injuries to employees of a railroad corporation . . . arising under State or Federal laws, shall be preferred claims . . ." 11 U. S. C. § 205(n).

This statutory language applied to reorganizations of railroads under § 77 and did not apply to federal equity receiverships, which still were available for railroad reorganizations. Even after the enactment of § 77, preference for claims for personal injuries continued to be denied in federal equity receiverships. *Pitcairn v. Fisher*, 78 F. 2d 649 (8th Cir. 1935); *Carpenter v. Wabash Ry.*, 103 F. 2d 996 (8th Cir. 1939), *rev'd* 309 U. S. 23 (1940).

In 1939 § 77(n) of the Bankruptcy Act, which, as stated, granted a preference to tort claims of employees of a railroad in bankruptcy, was amended to include "equity receiverships of railroad corporations." The amendment did not include employees of a railroad in a Chapter X reorganization and the legislative history of the 1939 amendment to § 77(n) is interesting and significant. The report of the House Committee on the Judiciary on the 1939 amendment stated as follows [H. R. Rep. No. 1458, 76th Cong., 1st Sess. 1 (1939)]:

> "The purpose . . . is to place injured employees who have claims against railroads in equity receiverships in the same position as persons of the same class who have claims against roads in trusteeship under section 77. Under the present law the persons above designated, who have judgments against roads in receivership for injuries received prior to receivership, are classed as general creditors whereas judgments of such persons against roads in trusteeship are paid as operating expenses."

Also, in the Senate floor debate on the amendment, President (then Senator) Truman stated [84 Cong. Rec. 10677 (1939)]:

"This is an amendment of the Bankruptcy Act so as to put equity receiverships in exactly the same situation as reorganizations under Section 77."

It is thus apparent that the language of the amendment and its legislative history indicates that it was intended to apply to reorganization of railroads under § 77. Since railroads might either be in a § 77 proceeding or in an equity receivership, the amendment provided for the same priority in either type of reorganization. However, corporations in Chapter X proceedings were apparently not discussed in connection with the 1939 amendment.

The applicability of § 77(n) of the Bankruptcy Act is limited to claims for personal injuries "to employees of a railroad corporation." A railroad corporation is defined in the preceding section of the Act as "any common carrier by railroad engaged in the transportation of persons or property in interstate commerce, except a street, a suburban or interurban electric railway which is not operated as a part of a general railroad system of transportation or which does not derive more than 50 per centum of its operating revenues from the transportation of freight in standard steam railroad freight equipment." 11 U. S. C. A. § 205(m). Unless a person was employed by a railroad as defined in that section of the Act, he would not be entitled to priority under § 77(n).

It has previously been determined in this proceeding that the Hudson & Manhattan Railroad Company is an interurban electric railroad; that it does not operate as part of a general railroad system; and that it does not derive more than 50% of its operating revenue from freight. *In the Matter of Hudson & Manhattan Railroad Co.*, 126 F. Supp. 359 (S. D. N. Y. 1954). This Court is bound by that decision. Under the circumstances the Debtor is not a railroad corporation within the meaning of § 77(n) of the Bankruptcy Act and the provisions for priority therein contained would not be applicable to the employees of the Debtor.

The application by the tort claimants for priority status in the administration of the estate of the Debtor is denied. So ordered.

Dated: New York, N. Y.
May 25, 1959

ARCHIE O. DAWSON,
U. S. D. J.

ORDER DENYING CLAIMS OF VARIOUS TORT CLAIMANTS TO PRIORITY.

ORDER No. 232

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK.

In Proceedings for the Reorganization of a Corporation pursuant to Chapter X of the Bankruptcy Act No. 90460

IN THE MATTER
of
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor.

The claims of various tort claimants to priority and the objections thereto of the Trustee, dated April 7, 1959, having duly come on for hearing on May 4, 1959, pursuant to Order No. 315 herein; after the hearing of argument and the receipt of exhibits on May 4, 1959; various tort claimants having submitted briefs in support of their claims to priority and the Trustee and various representatives of security holders having submitted briefs in opposition to said claims; all parties in interest having been heard or been given an opportunity to be heard; upon all the proceedings heretofore had herein; and the Court having entered its Opinion herein, dated May 25, 1959; it is hereby

ORDERED, that the claims of said tort claimants to priority be and they hereby are denied.

Dated: New York, N. Y.
May 27, 1959

ARCHIE O. DAWSON,
U. S. D. J.

OPINION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

No. 185—October Term, 1959.

(Argued December 2, 1959 Decided January 7, 1960.)

Docket No. 25959

NORINE J. AUGUS, Admx., GEORGE DOHERTY, RAYMOND NICHOLAS, ADRIAN PARKER, HUGH J. McKOWNE, MARGARET M. McAULIFFE, Admx., JOHN FEDOR, MAURICE DUNLAP, JOSEPH COYLE, CATHERINE CURRISTAN, Admx., JOSEPH MULLER, ROBERT J. JERRY and JOHN J. WALSH,
Appellants,

v.

HERMAN T. STICHMAN, Trustee of Hudson & Manhattan Railroad Company, Debtor, *et al.*,
Appellees.

Before: CLARK, WATERMAN and MOORE, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Dawson, *D. J.*, denying a motion of employee tort claimants for preferences in a Chapter X reorganization of debtor. 178 F. Supp. 103. Affirmed.

JOSEPH S. LORD, III, Philadelphia, Penna. (Richter, Lord & Levy, Philadelphia, Penna., Nathan Katz, Leo Gitlin, New York, N. Y., on the brief), *for Appellants.*

WILFRED FEINBERG, New York, N. Y. (McGoldrick, Dannett, Horowitz & Golub, New York, N. Y., William W. Golub, Bernard Buchholz, New York, N. Y., on the brief), *for Trustee of the Debtor.*

JACOB IMBERMAN, New York, N. Y. (Proskauer Rose Goetz & Mendelsohn, New York, N. Y., Marvin Dicker, New York, N. Y., on the brief), *for Chemical Bank New York Trust Company, as Successor Trustee, under the Debtor's Adjustment Income Bond Indenture.*

PER CURIAM:

Appellants, as employee tort claimants (or their representatives) under the Federal Employers' Liability Act, seek priority status for their claims (liquidated and unliquidated) from the debtor corporation. Their injuries were sustained prior to the appointment of the receiver pursuant to Chapter X of the Bankruptcy Act.

Prior to 1933 the courts uniformly held that under equity receiverships such employee tort claimants were not equitably entitled to a preference over secured creditors. In 1933 and 1934 Congress added two sections to the Bankruptcy Act for the reorganization of financially distressed businesses; Section 77 for railroads as defined in subdivision (m) thereof, and Section 77B for others. The debtor here does not come within the provisions of Section 77(m) —a fact already judicially established (*In Re Hudson & Manhattan Railroad Company*, S. D. N. Y., 1954, 126 F. Supp. 359). Section 77(s) (renumbered (n) in 1935) created a preference for employee tort claimants in Section 77 reorganizations. The Chandler Act of 1938 revised 77B as Chapter X; Section 77 was untouched. In 1939 subdivision 77(n) was amended to include preferences for railroad employees holding tort claims in equity receiverships

but no such action was taken as to employees of railroads reorganizing under Chapter X.[1]

During this interim period the Eighth Circuit decided two cases in which they held that railroad employees derived no priority from Section 77 in an equity receivership (*Carpenter v. Wabash Ry. Co.*, 8 Cir., 1939, 103 F. 2d 996, rev'd 309 U. S. 23 (1940); *Pitcairn v. Fisher*, 8 Cir., 1935, 78 F. 2d 649). The former case was reversed on the basis of the 1939 amendment.

Despite the fact that the problem of priority had been raised in court decisions prior to the 1939 amendment Congress did not extend claim priority to employees in the position of these claimants. It is not for the courts to create by judicial legislation preferences which Congress did not grant. True, the tracks of the debtor parallel those of other railroads and in many ways the operations are similar, but the debtor is not a Section 77 railroad. This status precludes preferential treatment of these claims. Judge Dawson carefully and accurately reviewed the statutes and cases (*In Re Hudson & Manhattan Railroad Company*, S. D. N. Y., 1959, 178 F. Supp. 103) and his conclusions therefrom are affirmed.

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1. Chapter VIII, Section 77, Act of March 3, 1933, 47 Stat. 1474;
   Chapter VIII, Section 77B, Act of June 7, 1934, 48 Stat. 911;
   Chapter VIII, Section 77(n) as amended, Act of August 27, 1935, 49 Stat. 911;
   Chapter X, Act of June 22, 1938, 52 Stat. 883;
   Chapter VIII, Section 77(n) as amended, Act of August 11, 1939, 53 Stat. 1406.

JUDGMENT.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of January, one thousand nine hundred and sixty.
Present:

HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
Circuit Judges.

IN THE MATTER
of
HUDSON & MANHATTAN RAILROAD COMPANY,
Debtor.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

FILE COPY

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JAMES R. BROWNING, Clerk

No. 836

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

NORINE J. AUGUS, ADMX., GEORGE DOHERTY, RAYMOND NICHOLAS, ADRIAN PARKER, HUGH J. McKOWNE, MARGARET M. McAULIFFE, ADMX., JOHN FEDOR, MAURICE DUNLAP, JOSEPH COYLE, CATHERINE CURRISTAN, ADMX., JOSEPH MULLER, ROBERT J. JERRY AND JOHN J. WALSH,

Petitioners,

against

HERMAN T. STICHMAN, TRUSTEE OF HUDSON & MANHATTAN RAILROAD COMPANY, DEBTOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, TRUSTEE OF THE DEBTOR, IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 836

NORINE J. AUGUS, ADMX., GEORGE DOHERTY, RAYMOND NICHOLAS, ADRIAN PARKER, HUGH J. McKOWNE, MARGARET M. McAULIFFE, ADMX., JOHN FEDOR, MAURICE DUNLAP, JOSEPH COYLE, CATHERINE CURRISTAN, ADMX., JOSEPH MULLER, ROBERT J. JERRY AND JOHN J. WALSH,

Petitioners,

against

HERMAN T. STICHMAN, TRUSTEE OF HUDSON & MANHATTAN RAILROAD COMPANY, DEBTOR, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, TRUSTEE OF THE DEBTOR, IN OPPOSITION

Question Presented

In a proceeding under Chapter X of the Bankruptcy Act, must pre-administration employee tort claimants be accorded priority over secured bondholders and other unsecured creditors, including other tort claimants?

Statute Involved

The only statute involved is Section 197 of Chapter X of the Bankruptcy Act (11 U. S. C. §597). The pertinent provisions of Section 197 are as follows:

"For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock.* * *"

Statement

Hudson & Manhattan Railroad Company ("the Debtor") owns and operates an interurban electric passenger railroad, two large office buildings, and other real estate. On August 11, 1954, an involuntary petition under Chapter X of the Bankruptcy Act was filed against it. A receiver was appointed on November 24, 1954. Subsequently, the Chapter X petition was approved and the Trustee was appointed. See *In re Hudson & Manhattan R. R.*, 229 F. 2d 616, 618 (2d Cir. 1956), *cert. denied*, 351 U. S. 982 (1956); *In re Hudson & Manhattan R. R.*, 138 F. Supp. 195 (S. D. N. Y. 1955).

The petitioners herein are 13 employees or personal representatives of deceased employees of the Debtor. There are, however, a total of 91 claims on file in the proceeding for torts antedating the appointment of the receiver. Of these, 33 were filed by employees or their representatives ("employee claims"), and 58 by others, such as passengers allegedly injured while using the Debtor's facilities ("public claims"). All of the employee claims arose under the Federal Employers' Liability Act ("FELA") (45 U. S. C. §51 *et seq.*).*

The Debtor's plan of reorganization, which has been approved by the District Court, establishes a number of

---

* All claims arising after the appointment of the receiver, whether FELA claims or otherwise, are paid in full as expenses of administration.

classes of creditors. Unsecured creditors are divided into several classes. Those who hold six-months' claims or other claims entitled to priority are in classes which will be paid in cash the amounts of their claims as finally allowed. All other unsecured creditors are to be paid 10 cents in cash for each dollar of their claims as finally allowed. The three classes of the Debtor's bondholders, with claims totaling over $60 million, will not be paid in full under the plan, but will receive securities of the reorganized company.

The resolution of the priority question raised herein will thus determine whether petitioners will receive 10 or 100 cents per dollar on their allowed claims. There is no issue as to the fairness of the respective treatments of bondholders and unsecured creditors under the plan.

In the District Court, the status of both employee and public claims was in issue. Priority was denied to all these claims on the basis of the well-established federal equity receivership precedents that pre-receivership tort claims are not entitled to preferred treatment (2a).*

As to the employee claims, the District Court recognized that there was a limited statutory exception to the general equity rule. However, it pointed out that this exception, contained in Section 77(n) of the Bankruptcy Act, only grants priority to employees of a "railroad corporation" as defined by Section 77 [11 U. S. C. §205(n)]. Since the Debtor had been held not to be a "railroad corporation" subject to Section 77 [*In re Hudson & Manhattan R. R.*, 126 F. Supp. 359 (S. D. N. Y. 1954)], the District Court concluded that the exception did not apply in this case. It therefore followed the general equity rule.

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* References to pages followed by "a" are to the appendix to the petition herein. References to pages preceded by "R." are to the stenographic minutes of the hearing in the District Court, part of the record on appeal.

No appeal was taken from the denial of priority to the public claims. Petitioners appealed, contending that equity requires that a priority be granted to their claims even though there is no statutory or judicially-recognized basis therefor.

The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court. It pointed out that, prior to 1933, equity receivership courts uniformly held that pre-receivership employee tort claims "were not equitably entitled to a preference over secured creditors" (8a). It further pointed out that, since the statutory exception to this rule contained in Section 77 (enacted in 1933 and amended in 1939) had not been extended by Congress to employees of railroads reorganizing under Chapter X, it would be judicial legislation to grant the requested priority (9a).

Petitioners concede that the District Court and the Court of Appeals were correct in their rulings that Section 77(n) of the Bankruptcy Act is inapplicable to this case (Petition, p. 10). Despite this concession, petitioners contend that, because they are railroad employees and their claims arose under the FELA, the equity precedents should have been disregarded and a new priority created for them by judicial invention.

Argument

1. The decision below does not involve an important issue of federal law that would warrant review by this Court. While petitioners have attempted to present a more limited question, the real issue is whether pre-administration employee tort claims in any Chapter X proceeding are entitled to priority status. Indeed, one might even view the question as relating to all pre-administration tort claims

because it is most difficult to differentiate between employee and public claims in this respect.

However viewed, the question involved herein has been answered conclusively by a long line of decisions in equity receiverships and Chapter X proceedings. The requirement that a Chapter X plan be fair and equitable embodies the "absolute priority rule" established in *Northern Pacific Ry.* v. *Boyd*, 228 U. S. 482 (1913). See *Marine Harbor Properties, Inc.* v. *Manufacturers Trust Co.*, 317 U. S. 78 (1942); *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106 (1939). The principle of the *Boyd* case is that senior creditors must receive the full value of their claims in a reorganization before junior creditors or stockholders receive anything.

To be excepted from this fundamental principle, there must be a statutory or judicially-recognized basis for according an unsecured creditor priority over bondholders. There is no such basis here. On the contrary, the well-settled equity rule that pre-receivership tort claims are not entitled to priority clearly forecloses the granting of priority status to the petitioners.

Chapter X proceedings have been conducted effectively for over 20 years in accordance with this rule. There thus is no need in connection with the administration of the Bankruptcy Act for this Court to consider the question presented herein. This is particularly true if the question is viewed as the more limited issue framed by petitioners—the priority status of pre-administration FELA claims in a Chapter X proceeding. Since petitioners would have this Court establish a more favorable rule for FELA claims than would be applicable to other types of employee tort claims, it is obvious that the issue they raise would not be involved in most Chapter X proceedings.

2. Petitioners also contend, as a basis for granting the writ, that "The decision below represents the refusal of a chancellor to do that kind of equity which is demanded by the facts at bar" (Petition, p. 7). This assertion, addressed to the correctness of the exercise of discretion by the courts below, does not provide a sufficient basis for this Court's consideration of this case. In any event, the assertion cannot be substantiated because, we submit, the courts applied equitable principles and applied them correctly.

The District Court obviously looked to the clearly-developed body of relevant decisions in equity receiverships, Judge Dawson cited three cases—*St. Louis Trust Co.* v. *Riley*, 70 Fed. 32 (8th Cir. 1895); *Pennsylvania Steel Co.* v. *New York City Ry.*, 216 Fed. 458 (2d Cir. 1914); and *Veatch* v. *American Loan & Trust Co.*, 79 Fed. 471 (8th Cir. 1897), *aff'd on rehearing*, 84 Fed. 274 (8th Cir. 1897)—in support of his conclusion that "It is well established that all tort claims against a Debtor which has gone into receivership are to be denied priority if the claim ante-dated the receivership" (2a). Each of these cases was decided by a court in an equity receivership. Similarly, the Court of Appeals referred to and relied upon the equity receivership precedents (8a).

What petitioners really mean, we suspect, is that the courts below refused to equate "sympathy" with "equity". Thus, in colloquy with counsel in the District Court, Judge Dawson stated (R. 8747-8):

> "The Court: Well, I don't believe an argument is in equity based purely on sympathy. I don't believe that the law can be applied on the basis of sympathy. I do think that equity means with due regard to the provisions of law that have been laid down. Anybody who gets up and argues on the sympathetic basis I am going to say is wasting

> their time because you have sympathy in a lot of cases but if they argue on the straight legal question of equity I would be glad to hear it."

It is true that there are limited exceptions to the absolute priority rule first developed in equity receiverships. One such exception, the "six-months' rule", accords priority to certain types of unsecured pre-receivership claims. In *Johnson Fare Box Company* v. *Doyle*, 250 F. 2d 656 (2d Cir. 1958), *cert. denied*, 357 U. S. 938 (1958), this rule was characterized as follows (at 657):

> "The so-called six months' priority rule is an invasion of the established contract rights of lienholders. As an invasion the rule should be strictly contained within narrow confines and limited to the purposes which brought it into being. In summary, the rule assumes that debts contracted during a short period, usually fixed at six months before a receivership, for labor, supplies or repairs necessary for a company's operation so redound to the benefit of the lienholders and other creditors that they should receive preferred treatment. On the other hand, new equipment purchased and new construction as distinguished from repairs would not fall within the preferred class. * * *"

In recognition of the limited scope of this deviation from the "absolute priority rule", the courts have uniformly refused to grant priority to tort claims through the six months' rule. In *Pitcairn* v. *Fisher*, 78 F. 2d 649 (8th Cir. 1935), an equity receivership of a railroad, it was contended that an employee tort claim should be preferred because it arose less than six months prior to the receivership. The lower court granted the priority, but the Court of Appeals for the Eighth Circuit reversed, stating in part (at 652):

> "So, it is too plain for argument, that an alleged preference for claims for damages for personal injuries, is bottomed on no better basis than sentiment, and such a consideration is not for the courts, when in the teeth of the existing law; but such things are for the Congress, which has power to make new laws or to change old laws. The court cannot change the law; it can only interpret it and announce it, or apply it to facts as the facts exist. So. too, it is clear, that there is no better reason in law for making a claim of an employee a preferred claim when it arises from a judgment for damages for negligence than there is for making the similar claim of a passenger preferred under the same circumstances. For in neither case does the accrual of the claim add one jot or tittle to the preservation of the property, or toward an increase of its value. In fact, it is in derogation instead of augmentation of value; it lessens it, instead of increasing it."

The refusal to grant priority has extended to tort claims of employees and others, both within and earlier than the six-months' period. In addition to the *Pitcairn* case and the decisions cited at page 6, see *Brooks* v. *St. Louis-San Francisco Ry.*, 180 F. 2d 185 (8th Cir. 1950), cert. *denied*, 339 U. S. 966 (1950); *In re New York, N. H. & H. R. R.*, 92 F. 2d 428 (2d Cir. 1937), *cert. denied*, 303 U. S. 650 (1938).

3. Petitioners do not assert that the decision below is in conflict with any decision of another court of appeals or of this Court. In an effort to come within this Court's requirements for review, they refer to two cases which allegedly conflict "in genuine principle" with the decision of the court below (Petition, p. 7). These cases are: *Reconstruction Finance Corporation* v. *Missouri-Kansas-Texas R. R.*, 122 F. 2d 326 (8th Cir. 1941), and *Bowen* v. *Hockley*,

71 F. 2d 781 (4th Cir. 1934). There is no conflict between these decisions and the decision below in actuality or in "principle".

(a) The *RFC* case involved a federal equity receivership of a railroad corporation. During the receivership, a railroad employee was injured in the course of his employment. Since the injury occurred during the receivership, there was no question that the employee's claim was an administration expense entitled to priority. The problem presented arose from the inadequacy of the assets of the estate to provide for the payment in full of all expenses of administration.

Under these circumstances, the district court felt constrained to rank the claims of administration creditors among themselves. It gave top priority to judicial costs, second priority to federal taxes, third priority to state and local taxes, fourth priority to the receiver's operating expenses (including the employee's tort claim), and fifth priority to certain RFC certificates. It was apparent that creditors in the fourth category would not be paid in full. On appeal, the Court of Appeals for the Eighth Circuit ruled that the employee's tort claim should be accorded a priority over other expenses included in the fourth priority group.

The *RFC* case thus did not involve a question of priority for a pre-bankruptcy tort claimant over mortgage creditors. It was concerned with the most unusual situation where an estate *in custodia legis* was insufficient to meet its own expenses.

It is also significant that the court which decided the *RFC* case is the same court which had decided *Pitcairn* v. *Fisher*, 78 F. 2d 649 (8th Cir. 1935), and subsequently decided *Brooks* v. *St. Louis-San Francisco Ry.*, 180 F. 2d 185 (8th Cir. 1950), *cert. denied*, 339 U. S. 966 (1950). In

both of these cases, priority was denied to pre-bankruptcy tort claims on the ground that this treatment accorded with the general rule.

(b) *Bowen* v. *Hockley*, 71 F. 2d 781 (4th Cir. 1934), involved a federal equity receivership of a chemical corporation. Prior to the receivership, petitioner's husband had been killed as the result of injuries received as an employee of the company and petitioner had been receiving weekly workmen's compensation payments. Payments were discontinued when the company went into receivership. The Court of Appeals for the Fourth Circuit directed the receiver to continue payment of the weekly compensation installments falling due during the period of the receivership.

The case does not conflict with the decision below because no question of priority for tort claims was raised in *Bowen*. As the court stated in its opinion (at 782):

> "* * * the question presented to the court is, not whether a claim for compensation is entitled to preference * * * but whether receivers * * * should be required to continue making compensation payments awarded against the business as a self-insurer by a Workmen's Compensation Commission."

The limited significance of *Bowen* was pointed out by Judge Learned Hand in *In re New York, N. H. & H. R. R.*, 92 F. 2d 428 (2d Cir. 1937), *cert. denied*, 303 U. S. 650 (1938), a decision denying priority to tort claimants, as follows (at 430):

> "* * * In *Bowen* v. *Hockley* (C. C. A.), 71 F. (2d) 781, 94 A. L. R. 856, the Fourth Circuit did indeed establish an exception in the case of compensation awards to employees, though even then only to the extent of charging upon income such installments

> as fell due during the receivership. The reasoning on which this rested was that, as the employee's labor was necessary to the operation of the road, his compensation, like his wages, was for the benefit of the lienor. It may be doubted whether compensation stands like wages in the sense that doubts as to its priority in insolvency would even remotely affect the willingness of the men to continue to work; but with that we need not concern ourselves. * * *"

4. In a final effort to meet this Court's requirements for review, petitioners assert that the decision below "* * * is in conflict with the philosophy underlying the decisional law through which this Court has been diligent to protect the rights of FELA claimants since the enactment of the 1939 amendment" (Petition, p. 7). There is no assertion of any actual conflict with any decision of this Court. And, as we shall show, there is no basis for the assertion of a conflict with this Court's "philosophy" in FELA cases.

It should first be noted that there can be no contention here that the FELA claims, as such, have been discriminated against. The FELA claims have received the same classification as all other pre-receivership tort claims. Nor can there be any contention that the decision below attempted to insulate the employer from liability imposed under the FELA. All of the claims have either been allowed or are in the process of liquidation. The sole question here is how claims admittedly allowed are to be classified in a Chapter X proceeding.

Petitioners assume, however, that because FELA claimants are involved, any decision denying such claims a priority in a reorganization under Chapter X of the Bankruptcy Act must be in conflict with this Court's decisions in FELA cases. It is submitted that this is not so.

It may well be that the decisions of this Court in FELA cases arising after the 1939 amendment of the FELA have resulted in an expansion of the rights of railroad employees. But those decisions involved questions of procedure and liability under the FELA. They were not concerned in any way with the considerations to be evaluated in a clash of creditors in a bankruptcy situation.

The rights of railroad workers in FELA proceedings involve issues altogether different from their rights in a bankruptcy proceeding. This concept was clearly recognized by this Court in *Nathanson* v. *National Labor Relations Board*, 344 U. S. 25 (1952), which denied fifth class priority to back pay awards in a straight bankruptcy proceeding. The Court stated (at 28-29):

> "* * * The Board argues that the interest of the United States in eradicating unfair labor practices is so great that the back pay order should be given the additional sanction of priority in payment. Whether that should be done is a legislative decision. *The contest now is no longer between employees and management but between various classes of creditors.* The policy of the National Labor Relations Act is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act. * * *" (Italics ours.)

As in *Nathanson*, the decision below relates to the contest "between various classes of creditors" and thus does not conflict in any sense with this Court's decisions relating to the contest "between employees and management" arising in FELA cases.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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